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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

14 MICHELE MAZUR, On Behalf of Herself
and all Others Similarly Situated,

15 Plaintiff,

16 v.

17 EBAY INC., HOT JEWELRY
18 AUCTIONS.COM d/b/a JEWELRY
OVERSTOCK AUCTIONS, HOT
19 JEWELRY AUCTIONS.COM d/b/a
PARAMOUNT AUCTIONS, and DOES 1-
20 100, inclusive,

21 Defendants.

Case No. C07 3967 MHP

**DEFENDANT eBAY'S REPLY IN SUPPORT
OF ITS MOTION TO DISMISS COMPLAINT**

Date: Mon. Jan. 14, 2007
Time: 2:00 p.m.
Judge: Hon. Marilyn H. Patel
Trial Date: Not yet set

1 **I. INTRODUCTION**

2 Boiled down to its essence, Plaintiff's Complaint seeks to hold eBay liable for the conduct
3 of HJA in connection with auctions HJA conducted on eBay's website. As explained in eBay's
4 initial memorandum, all of Plaintiff's claims should be dismissed pursuant to the
5 Communications Decency Act, 47 U.S.C. § 230 (hereinafter, "CDA" or "section 230"), which
6 immunizes eBay from claims that seek to impose liability on an interactive computer service
7 provider for wrongful conduct originated by a third-party. Plaintiff asks the Court to ignore the
8 CDA because her complaint alleges that eBay made false assurances about the safety of online
9 auctions and failed to adequately screen live auction sellers. But even under Plaintiff's own
10 theory, eBay's general assurances of safety were misleading only if *HJA* engaged in shill-bidding
11 inconsistent with eBay's statements and eBay failed to prevent *HJA*'s wrongful conduct. These
12 types of "fraud" allegations fall squarely within the scope of CDA immunity, as explicitly
13 recognized in the case law discussed below.

14 Further, the "fraudulent" statements on which Plaintiff relies are neutralized by the
15 context in which they appear. Plaintiff takes snippets from web pages out of context to
16 manufacture the appearance of false statements. But when the statements are viewed in their
17 entirety and in the context of eBay's User Agreements, Plaintiff's allegations fall apart. For these
18 reasons, Plaintiff's allegations against eBay are legally deficient and they should be dismissed
19 with prejudice.

20 **II. ARGUMENT**

21 **A. The CDA Bars Claims Precisely Like Plaintiff's.**

22 Plaintiff seeks to avoid the CDA with three arguments. Plaintiff contends (i) eBay was
23 not acting as a publisher because eBay made its own misleading statements about the safety of
24 live auctions, (ii) eBay is not immune because it profited from HJA's unlawful behavior, and (iii)
25 eBay is not immune because eBay knew (or should have known) about HJA's unlawful behavior.
26 Each of these arguments has been rejected in other cases and should likewise be rejected here.

1 **1. Plaintiff Cannot Circumvent The CDA By Relying On General**
 2 **Assurances By eBay That Allegedly Became False Due to HJA's**
 3 **Wrongful Conduct.**

4 In the seminal case on CDA immunity, the Court of Appeal in *Zeran* recognized that “[b]y
 5 its plain language, § 230 creates a federal immunity to any cause of action that would make
 6 service providers liable for information originating with a third-party user of the service.” *Zeran*
 7 *v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Since its enactment, plaintiffs have
 8 tried to plead around the CDA by taking claims that are essentially based on third-party conduct
 9 and repackaging them as a claim for independent wrongdoing by the interactive computer service
 10 provider. Courts have consistently rejected these efforts to avoid CDA immunity through artful
 11 pleading. As one District Court explained, “in determining whether to apply the CDA, the Court
 12 should not ask what particular form the plaintiff’s claim takes ... but whether the claim is directed
 13 toward the defendant in its publishing, editorial, and/or screening capacities” *Doe v.*
 14 *SexSearch.com*, 502 F. Supp. 2d 719, 727 (N.D. Ohio 2007) (internal quotations omitted). Here,
 15 all of Plaintiff’s claims against eBay, whether they sound in fraud, negligence, contract, or
 16 statutory liability, are directed toward eBay’s publishing, editorial and screening capacities.¹

17 Plaintiff cannot avoid the CDA by alleging that eBay affirmatively misrepresented the
 18 safety of online auctions conducted on eBay.² Even accepting Plaintiff’s allegations as true, the
 19 only reason eBay’s general statements about the safety of online auctions could become false or
 20 misleading is if *HJA* engaged in alleged shill bidding that was inconsistent with eBay’s broad
 21 assurances and if eBay failed to detect and prevent *HJA*’s wrongful practices. Plaintiff’s fraud
 22 claim thus falls squarely within the scope of CDA immunity because it is premised on (i)
 23 wrongful conduct that originates from *HJA*, and (ii) eBay’ failure to adequately screen for this

24 ¹ Plaintiff’s claims that eBay is liable for “allowing” *HJA*’s allegedly fraudulent listings
 25 (Complaint ¶ 34) and failing to “carefully screen the auction houses” (Complaint ¶ 6) are
 26 indisputably directed to eBay’s publishing, editorial and screening capacities. Plaintiff appears to
 27 acknowledge that these allegations fall within the scope of CDA immunity.

28 ² Plaintiff acknowledges that CDA immunity bars negligence claims but contends that “[t]he
 CDA offers [eBay] no protection” when eBay “mak[es] its own false statements regarding the
 service that [it] provides.” (Opp. at 2.) The case law does not support this position: rather, as
 discussed herein, *Gentry*, *SexSearch.com*, and *Prickett* all require the dismissal of Plaintiff’s
 claims, whether they are premised on eBay’s allegedly negligent or fraudulent statements.

1 conduct.

2 As indicated in eBay's initial memorandum, the California Court of Appeal has
 3 recognized that eBay's general assurances about the online transactions conducted on its website
 4 do not allow a plaintiff to avoid the CDA. *See Gentry v. eBay*, 99 Cal. App. 4th 816 (2002).
 5 Plaintiff's effort to distinguish *Gentry* (Opp. at 3) is unavailing. To the contrary, the *Gentry*
 6 plaintiffs alleged (i) "that eBay itself misrepresented the safety of purchasing items from the
 7 individual defendants and knew or should have known the individual defendants were
 8 conducting unlawful practices but failed to ensure they comply with the law," *id.* at 833, (ii) that
 9 eBay's own affirmative conduct "gave customers a false sense of confidence" in the online
 10 transactions conducted on eBay, *id.* at 822, and (iii) that eBay knew its statements were false, *id.*
 11 at 823. Not surprisingly, Plaintiff makes no attempt to address these key allegations from *Gentry*,
 12 which closely parallel the allegations Plaintiff now emphasizes in opposing eBay's motion.

13 The *Gentry* Court held that CDA immunity applied and focused on the substance of the
 14 claims as a whole:

15 The substance of appellants' allegations reveal they ultimately seek
 16 to hold eBay responsible for conduct falling within the reach of
 17 section 230, namely, eBay's dissemination of representations made
 18 by the individual defendants, or the posting of compilations of
 19 information generated by those defendants and other third parties.
 If by imposing liability ... we ultimately hold eBay responsible
 for content originating from other parties, we would be treating it as
 the publisher, viz., the original communicator, contrary to
 Congress's expressed intent under section 230(c)(1) and (e)(3).

20 *Id.* at 831. Similarly here, Plaintiff's fraud allegations do not take the complaint outside the scope
 21 of the CDA because they are all premised on alleged wrongful conduct that originates from HJA,
 22 not eBay.

23 Other recent cases applying the CDA confirm that fraud and misrepresentation claims are
 24 subject to immunity when they are premised on the wrongful conduct of third-parties. In
 25 *SexSearch.com*, the District Court dismissed plaintiff's fraud claim (and all other claims) based
 26 on the CDA. In that case, the plaintiff engaged with consensual sex with a minor that he met via
 27 the SexSearch website. When faced with criminal statutory rape charges, the plaintiff sued
 28 SexSearch.com. As here, the plaintiff sought to avoid the CDA by alleging that the website's

1 general assurances about the reliability of its online content were fraudulent. Specifically, the
 2 plaintiff alleged that SexSearch.com misrepresented that “all persons on its site are ‘18+’ years of
 3 age” and that it “verifies all members’ profiles prior to posting.” *SexSearch.com*, 502 F. Supp. 2d
 4 at 729. These allegations did not deter the court from holding that the complaint in its entirety
 5 was subject to the CDA. Analyzing the substance of plaintiff’s claims, the court found that
 6 plaintiff was ultimately trying to hold the website “liable for its publication of third-party content
 7 and harms flowing from the dissemination of that content.”

8 The underlying basis for Plaintiff’s claim is that if SexSearch had
 9 never published Jane Roe’s profile, Plaintiff and Jane Roe never
 10 would have met, and the sexual encounter never would have taken
 11 place. Plaintiff thus attempts to hold SexSearch liable for
 12 “decisions relating to the monitoring, screening, and deletion of
 content from its network-actions quintessentially related to a
 publisher’s role.” Section 230 specifically proscribes liability in
 such circumstances.

13 *Id.* at 727-28 (quoting *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003)).³ *See also*
 14 *Prickett v. InfoUSA, Inc.*, No. 4:05-CV-10, 2006 WL 887431, *3 (E.D.Tex. Mar. 30, 2006) (CDA
 15 applies to claim alleging that website passed on false information acquired from other sources,
 16 even though the website itself affirmatively stated that “We deliver the utmost quality
 17 information.... We also call every business to verify the information, so you can be assured of
 18 the most current and accurate listings”). These authorities confirm that Plaintiff cannot avoid the
 19 CDA merely by claiming that eBay allowed fraudulent auctions to occur that were inconsistent
 20 with its general assurances about the safety of live auctions.⁴ (*See, e.g.*, Complaint ¶ 34.)

21 Plaintiff’s reliance on *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006) for
 22 a contrary rule is misplaced. In that case, Plaintiff alleged that *Yahoo itself created and*
 23 *circulated fictitious dating profiles of individuals* in order to induce plaintiff and others to join or

24 _____
 25 ³ The district court also rejected plaintiff’s breach of contract and fraud claims because it found
 26 that they were precluded by the terms and conditions of the membership agreement between the
 website and the plaintiff.

27 ⁴ In addition, the statements referenced in the complaint as eBay’s affirmative representations
 28 regarding the “safety” of live auctions simply refer potential buyers to the live auction sellers’
 feedback scores, guarantees, and terms and conditions of sale. (*See* Motion at 9-10 and
 Somvichian Declaration Exhibits C and D.)

1 renew their membership in Yahoo's subscription dating service. There were no allegations of
 2 wrongdoing against anyone other than Yahoo. Unsurprisingly, the Northern District refused to
 3 apply section 230 immunity because it found that Yahoo had acted not as a publisher, but as an
 4 information content provider, when it "deliberately and intentionally originate[d], create[d] and
 5 perpetuate[d] false and/or non-existent profiles on its site." *Id.* at 1259. *Anthony* has nothing to
 6 do with Plaintiff's claim which seeks to hold eBay liable for general statements that are allegedly
 7 made false due to wrongful conduct that originates with a third-party.

8 **2. The CDA Bars Claims Even If The Publisher Had Notice Of** 9 **Wrongdoing.**

10 Plaintiff also contends that eBay should be estopped from relying on section 230
 11 immunity because it "has long known of the problem of shill bidding—having been sued for this
 12 before."⁵ (Opp. at 4.) This defense to immunity was squarely rejected in *Zeran* for three reasons:
 13 first, "liability upon notice has a chilling effect on the freedom of Internet speech." *Zeran*, 129
 14 F.3d at 333. Second, "notice-based liability would deter service providers from regulating the
 15 dissemination of offensive material over their own services," undermining self-regulation. *Id.*
 16 Finally, notice-based liability "would provide third parties with a no-cost means to create the
 17 basis for future lawsuits." *Id.*

18 The *Gentry* court was also faced with—and rejected—the assertion that CDA immunity
 19 should be denied because eBay knew that sellers were engaged in illegal conduct but failed to
 20 take action:

21 We reach the same conclusion [*i.e.*, affirming dismissal] with
 22 regard to appellants' general assertion that *eBay knew or should*
 23 *have known about the individual defendant's illegal or fraudulent*
 24 *conduct but failed to take steps to ensure they complied with the*
 25 *law.* This claim seeks to hold eBay responsible for having notice of
 26 illegal activities conducted by others on its Web site, and for
 electing not to take action against those third parties, including by
 withdrawing or somehow altering the content placed by them. *This*
is the classic kind of claim that Zeran found to be preempted by
section 230, as one that seeks to hold eBay liable for its exercise of

27 ⁵ It is unclear why eBay should have been made aware of HJA's alleged shill bidding by a 2005
 28 complaint alleging that an unrelated antiques dealer was engaged in shill bidding. It is undisputed
 that eBay has a strong, published policy against shill bidding on its website. See Complaint ¶ 47.

1 *a publisher's traditional editorial functions.* Such claims have been
 2 uniformly rejected by the courts that have considered them.

3 *Gentry*, 99 Cal. App. 4th at 835 (emphasis added) (internal citations omitted). Consequently,
 4 here, Plaintiff cannot avoid section 230 immunity through her claim that eBay knew of HJA's
 5 unlawful conduct.

6 **3. Plaintiff's Allegation That eBay Receives Some Proceeds From HJA's**
 7 **Auctions Is Irrelevant.**

8 Plaintiff's contention that eBay profited from HJA's unlawful activity does not change the
 9 analysis of the CDA's applicability. The *Gentry* court, squarely faced with this allegation, still
 10 applied CDA immunity. *See Gentry*, 99 Cal. App. 4th at 822.

11 **4. eBay's User Agreement Bars Plaintiff's Claims.**

12 Plaintiff acknowledges that eBay's User Agreement shields it from liability for the actions
 13 of auction houses, but contends, again, that she is trying to hold eBay liable "for its own actions"
 14 and points out that "Defendant eBay is being accused of *directly committing fraud*" because eBay
 15 misstated the safety of its live auctions. (Opp. at 5-6.) As fully discussed in eBay's Motion, the
 16 User Agreements⁶, to which Plaintiff expressly agreed, fully disclaim any warranties by eBay
 17 regarding the auction houses' compliance with the law, the auction houses' listings, or the
 18 information provided by auction houses. (*See Motion* at 8-9.) When the "safety" representations
 19 are viewed in their original context, it is apparent that Plaintiff has mischaracterized them and
 20 taken them out of context. One eBay web page touted by Plaintiff as eBay's guarantee of
 21 "safety" refers users to the "satisfaction and authenticity" guarantees provided by the *auction*
 22 *houses*, and the feedback forum where other eBay users have provided comments regarding the
 23 auction houses. (*See Motion* at 9-10.) The web page stating that "Participating in Live Auctions
 24 using the Internet is safe, easy, and fun!" refers users to the terms of eBay's Live Auction User
 25 Agreement and the terms and conditions imposed by each auction house, and reminds users that
 26 the sales transaction does not involve eBay: rather, buyers pay the auction house directly for
 27 items and receive items directly from the auction house, which guarantees its own items.

28 ⁶ Somvichian Declaration Exhs. A and B.

1 Plaintiff cannot create liability by picking and choosing particular statements from eBay's
 2 web pages while ignoring their context. As recently explained by the United States Supreme
 3 Court in *Bell Atl. Corp. v. Twombly*, when a district court is faced with a complaint trumpeting
 4 truncated quotations pulled out of context, it is appropriate for the district court to consider the
 5 full content of the document. 127 S. Ct. 1955, 1972 n.13. And when the full content of the
 6 document contradicts plaintiff's allegations, the document controls. *Thompson v. Illinois Dept. of*
 7 *Prof'l Reg.*, 300 F.3d 750, 754 (7th Cir. 2002).

8 In her Opposition, Plaintiff relies on *Hotels Nevada* to support the contention that "the
 9 User Agreement between Plaintiff and eBay is void because it was procured by fraud." (Opp. at
 10 6.) But as *Hotels Nevada* explains, a contract procured by fraud is not void, it is *voidable*. "In
 11 order to escape from its obligations the aggrieved party must *rescind*, by prompt notice and offer
 12 to restore the consideration received, if any." *Hotels Nevada v. L.A. Pacific Center, Inc.*, 144 Cal.
 13 App. 4th 754, 763 (2006) (emphasis in original) (quoting *Ford v. Shearson Lehman Am. Exp.,*
 14 *Inc.*, 180 Cal. App. 3d 1011, 1028 (1986)). Plaintiff has taken none of these steps. And none of
 15 the allegations in Plaintiff's Complaint supports the contention that the User Agreement was
 16 procured by fraud. In fact, in her Complaint, Plaintiff affirms her contract with eBay by suing on
 17 it. (See Complaint ¶¶ 9, 137, 138.) That Plaintiff now abandons her breach of contract claim
 18 (Opp. at 7) does not change this analysis. Because the User Agreement is enforceable, it bars
 19 Plaintiff's claims.

20 **B. Plaintiff's Negligence, Fraud, And Fraud-Based Statutory Claims Are Legally**
 21 **Insufficient.**

22 Plaintiff does not dispute that her allegations regarding eBay's "own" misleading
 23 representations are refuted by the context in which such statements appear (*see* Motion at 8-10).
 24 For this reason alone, Plaintiff's fraud claims and fraud-based statutory claims (CLRA, UCL, and
 25 RICO) are subject to dismissal with prejudice. Nor does Plaintiff explain why *Parrish v. Nat'l*
 26 *Football League Players Assoc.*, No. C07-00943 WHA, 2007 WL 2601385 (N.D. Cal. Sept. 6,
 27 2007) does not support dismissal of Plaintiff's fraud-based claims. Ignoring *Parrish*, Plaintiff
 28 contends that reliance need *not* be pled with particularity and posits the entirely circular argument

1 that Plaintiff “adequately and properly pled reliance” by “specifically alleg[ing] reliance.” (Opp.
 2 at 7, 8.) This insufficient pleading does not meet the requirements of Federal Rule of Civil
 3 Procedure 9(b) or 8. As the Supreme Court emphasized in *Twombly*, “a formulaic recitation of
 4 the elements of a cause of action will not” survive a motion to dismiss. *Id.*, 127 S. Ct. at 1965-66.
 5 Yet Plaintiff here relies exclusively on a formulaic recitation of the element of reliance.
 6 Plaintiff’s fraud-based claims fail because Plaintiff’s Complaint is devoid of allegations to
 7 support an inference that Plaintiff read and reasonably relied on eBay’s statements prior to
 8 participating in eBay’s Live Auctions.

9 Moreover, Plaintiff does not explain how any of her tort claims pass legal muster. Courts
 10 reject plaintiffs’ improper attempts to manufacture torts from contract disputes, and this case, at
 11 best, is a contract dispute between Plaintiff and eBay. (*See* Motion at 13-14.)

12 **C. Plaintiff’s Opposition Abandons Several Claims, Conceding That They**
 13 **Should Be Dismissed.**

14 In her Opposition, Plaintiff does not defend her First (CLRA), Second (UCL), Third (Bus.
 15 & Prof. Code § 17500 *et seq.*), Sixth (Civ. Code § 1572), or Seventh (Civ. Code § 1573) claims
 16 for relief and thus concedes that they should be dismissed. Plaintiff affirmatively abandons her
 17 Fifth (Com. Code § 2328) and Eighth (breach of contract) claims for relief (Opp. at 7), likewise
 18 conceding they should be dismissed.

19 **D. Leave To Amend Should Be Denied Since Amendment Would Be Futile.**

20 In the event the Court grants this motion, Plaintiff should not be given leave to amend her
 21 complaint. Amendment should not be granted when doing so would be futile. *Foman v. Davis*,
 22 371 U.S. 178, 182 (1962); *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004). As
 23 demonstrated above, Plaintiff’s claims regarding eBay’s misstatements and failure to screen
 24 sellers like HJA are completely barred by the CDA as a matter of law; consequently, Plaintiff is
 25 precluded from bringing this action. Furthermore, Plaintiff’s Complaint is premised
 26 mischaracterized quotations which, when viewed in the full context in which those statements
 27 were made, fail to support Plaintiff’s allegations of unlawful conduct. For these reasons, Plaintiff
 28 should not be granted leave to amend her complaint.

1 **III. CONCLUSION**

2 For the foregoing reasons, eBay respectfully requests that Plaintiff's first through eleventh
3 and twenty-first claims for relief be dismissed without leave to amend.

4 Dated: December 19, 2007

Respectfully submitted,

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9 /s/ Heather C. Meservy

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2007, I electronically filed the foregoing **DEFENDANT EBAY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record at the following listed email addresses.

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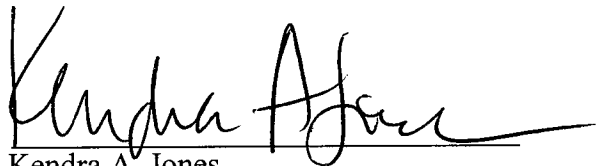
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I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery on this 19th day of December, 2007.

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